Date: September 18, 1997

Case No.: 96-INA-1

In the Matter of:

MRS. ESTHER HADDAD,
Employer

On Behalf Of:

CAROLINE KHAFIF,
Alien

Appearance: John Corbett, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On April 15, 1994, Mrs. Esther Haddad ("Employer") filed an application for labor certification to enable Caroline Khafif ("Alien") to fill the position of Household Cook (Kosher), Live-Out (AF 13-14).[2] The job duties for the position are:

> Plans menus and cook Kosher meals according to tastes of family. Prepares vegetables and meats for cooking. Boil, broil, fry or roast meat. Buy food, clean kitchen, prepare fancy dishes and serve meals. Prepares food according to Kosher dietary rules.

The requirements for the position are six years of grade school and two years of experience in the job offered.

The CO issued a Notice of Findings on May 12, 1995 (AF 42-45), proposing to deny certification on the grounds that it does not appear that the job offer meets the definition of "employment" as stated in the regulations at 20 C.F.R. § 656.50 (recodified as § 656.3). The CO directed the Employer to provide evidence which clearly establishes that the position, as performed in her household, "constitutes full-time employment and was not created solely to qualify the alien for a visa as a skilled worker." The CO also noted that this Employer previously had labor certification approved for another Alien in June 1991, and asked the Employer to submit information regarding whether this Alien is still employed and, if not, when did she leave. Also, the CO requested that the Employer explain why she previously sought certification for a Houseworker, General, who performed cooking duties and now seeks a full-time, permanent Cook. Lastly, the CO requested the Employer to explain why she is willing to wait for labor certification for this Alien instead of hiring a more immediately available U.S. worker.

Accordingly, the Employer was notified that it had until June 16, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated June 13, 1995, and submitted under cover letter dated June 14, 1995 (AF 46-49), the Employer contended that the cook will be expected to prepare five meals per day

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] The application was amended by the Employer on October 3, 1994, to reflect wages of $12.81 per hour and to change "Live-in" to "Live-out" (AF 12).

for a total of 25 meals per week. She stated that there are four members of her household; herself, her husband, and their two children. The Employer further stated that,

> Since we keep a strict Kosher household, the cook will be required to buy our food at special stores and this will require daily shopping trips on her part which will consume about 2 hours per day of her work schedule. In addition to planning menus and cooking, she will also be required to clean the kitchen and serve meals. Including the cooking time, cleaning the kitchen and serving the meals, as well as the actual time in preparing the meals, the length of time required to prepare the various meals following strict Kosher dietary rules are as follows: breakfast: 1 hour; snack: 1/2 hour; lunch: 1-1/2 hours; afternoon snacks: 1/2 hour; dinner: 2-1/2 hours.

The Employer further contended that the Cook will be responsible for preparing meals for family and friends who are guests on various religious holy days. She then stated that the Cook will not be responsible for any duties other than cooking, nor has she employed any full-time Kosher Cooks in the past. The Employer advised that she will continue doing the other household chores such as cleaning, laundering, vacuuming, and the child care.

In regard to the Employer's previously labor certified employee, she left the Employer's employ over two years ago as the Employer quit working and no longer needs a live-in houseworker.

The CO issued the Final Determination on June 21, 1995 (AF 50-52), denying certification because it does not appear that the job duties, standing alone in this household, would reasonably be considered full-time employment.

On July 20, 1995, the Employer requested review of the Denial of Labor Certification (AF 53-61). On September 22, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 44-45). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, how the children are cared for during the Alien's scheduled time off; (5) who will perform the general household maintenance duties, such as cleaning, clothes washing, vacuuming, etc., and, (6) evidence that the Employer has employed a full-time cook in the past.

In rebuttal, the Employer asserted that the cook will prepare five meals per day and 25 meals per week (AF 48). Specifically, she stated that breakfast will take one hour to prepare, the snacks will take one-half hour, lunch will take 1½ hours, and dinner will take 2½ hours to prepare. The Employer further explained that the cook will be required to purchase the foodstuffs, which will take two hours per day. Moreover, the Employer stated that the Cook will be required to clean the kitchen and serve the meals. The Employer asserted that the Cook will prepare each meal for herself, her husband, and their two children (AF 47). She stated that her husband works full time in a family business and her oldest child attends school from 9:00 a.m. to 1:30 p.m. Finally, the Employer explained that she takes care of the children and performs the household maintenance duties as she does not work.

As indicated, the issue here is whether or not the CO's conclusion, that full-time employment is not being offered, is a reasonable inference from these facts. However, we are unable to make that determination at this time, as the CO has raised a new issue for the first time in the Final Determination. Specifically, the CO noted that "it appears at least one family member, Mona, is not present for breakfast or lunch. It is unknown if the employer's husband is present for breakfast and lunch." (AF 51). However, we note that the Employer did not specify the time that breakfast is served. Moreover, it is quite possible that the child and the father return home for lunch or pack their lunches. Therefore, we find that the CO should have given the Employer an opportunity to explain this possible discrepancy by issuing a second NOF.

However, we are also concerned that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered to be unduly restrictive. The job requirements include two years of experience in the job duties of Kosher cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in Kosher cooking. Therefore, this matter will be remanded with instructions to the CO to consider whether the Employer's requirement of two years of experience in cooking Kosher foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of*

Occupational Titles (DOT). On Remand, the CO is also permitted to develop additional evidence if it is believed that full-time employment is not being offered.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further action consistent with this decision.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, dissenting:

I respectfully dissent. I would affirm denial of labor certification for the reasons stated by the CO. I agree with the majority, however, on remand that whether the specialized requirement of kosher cooking is unduly restrictive should be addressed.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.